Supreme Court, U. S.
FILED
SEP 13 1980
MICHAEL RODAK, JR., CLERK

No. 80-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
Respondent.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA,
Petitioner,

versus

ENSLEY BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Respondents.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA,
Petitioner,

versus

JOHN W. MARTIN, *et al.*,
Respondent.

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA,
Petitioner,

versus

LUCY WALKER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. Whether the principle set forth in *Washington* v. *Davis,* 426 U.S. 229 (1976), that performance in a training course could be used as a criterion to show a test was job-related, set standards of test validation applicable to Title VII.

2. Whether a test having adverse racial impact which has been validated against job-relevant training may be used by an employer without a showing that success in training correlates significantly with success on the job.

3. Whether tests having adverse impact may be used to select a group of applicants having more than the minimum skills necessary to complete a job-relevant training program.

4. Whether it is appropriate, in a Title VII challenge of a test's job-relatedness, to balance the degree of validity of the test with the amount of adverse impact.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Fifth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on May 8, 1980.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 616 F.2d 812. That opinion affirmed in part and reversed in part the order and opinion of the United States District Court for the Northern District of Alabama dated January 10, 1977. The District Court's opinion and order are reported at 13 EPD ¶ 11,504. These opinions and orders are reproduced in Appendices A through D.

JURISDICTION

The judgment of the court of appeals was rendered on May 8, 1980. The respondents' timely petition for rehearing was denied on June 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Jurisdiction below was based on alleged violations of the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1983, 2000(e) *et seq.* (Title VII), the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3766(c), and the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. § 1242.

STATEMENT OF THE CASE

The Personnel Board of Jefferson County, Alabama, is the civil service employment agency for Jefferson County, the cities and towns in Jefferson County (including Birmingham, Alabama), and most governmental boards and agencies in the county. The Personnel Board is responsible for recruiting, screening and certifying qualified applicants for jobs within the civil service system. As part of its certification program, the Board develops its own examinations or purchases professionally developed examinations for use in screening and selecting qualified candidates for civil service jobs.

In 1965 the Personnel Board procured professionally developed police officer and firefighter examinations from the International Personnel Management Association (IPMA).

After the decision was made to use the IPMA examinations, the Board initiated in-house validation studies to insure that these entrance exams were job-related. Prior to the time Title VII was made applicable to state and local governments, the Personnel Board contracted with independent industrial psychologists to perform separate validity studies of the police officer and firefighter entrance examinations. The independent experts subsequently concluded that the police officer exam correlated significantly with performance in the police academy and performance on the job. The experts further concluded that the firefighter exam correlated significantly with performance in the firefighter academy and performance on the job during the first three years, the "apprentice" years.

On January 4, 1974, the Ensley Branch of the N.A.A.C.P. filed a suit against the Personnel Board and other government entities and individuals in Jefferson County complaining that the defendants were engaged in discriminatory hiring practices. Three days later John W. Martin and other named plaintiffs filed a similar suit against the Personnel Board, the City of Birmingham, and Jefferson County. In May, 1975, the United States of America brought suit against the Personnel Board and other governmental entities within Jefferson County alleging a pattern or practice of discrimination against blacks and women. Finally, on February 20, 1976, Lucy Walker filed suit against the Board and the Jefferson County Nursing Home. All four cases were consolidated for trial.

In December, 1976, trial was held on the limited issue of whether the Board's use of entrance examinations for the jobs of police officer and firefighter violated Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. § 2000(e), *et seq.*), or other laws. The trial court reserved all other issues raised by the four complaints for a future hearing.

At trial, the Board's independent experts testified that performance on both the firefighter and police officer examinations

correlated significantly with performance in the training academies. The experts further testified that performance on the police officer examination correlated significantly with performance of police officers on the job. Appropriate police officers and firefighters testified that the training in both academies was critical and essential to the proper performance of firefighters and police officers. They further testified that these knowledges and skills could not be satisfactorily learned except through academy training.

Some of the district court's more important findings were:

(1) State law requires the Personnel Board to conduct examinations to "fairly test the relative capacity and fitness" of applicants for positions with local governmental agencies;[1]

(2) The Personnel Board used two objective, professionally developed tests to certify a pool of applicants as eligible for selection by various local hiring agencies for jobs as police officers and firefighters;[2]

(3) No other tests of equal or better validity were available for use by the Personnel Board;[3]

(4) The Personnel Board did not intentionally discriminate against blacks;[4]

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[1] 13 EPD 6794, App. C, page A-28.

[2] *Id.* at 6795, App. C, page A-29.

[3] *Id.* at 6806-07, App. C, page A-55.

[4] The court said: "It is *clear* that the Personnel Board . . . has not intentionally discriminated against blacks." *Id* at 6795, App. C, page A-30 (emphasis added). The plaintiffs dropped all challenges of sex discrimination on these exams the day trial began. *Id.* at 6808-07 n.5, App. C, page A-58.

(5) The Personnel Board had conducted a bona fide affirmative action program[5] and had promptly adopted changes in its certification procedures recommended by its qualified independent consultants;[6]

(6) The Personnel Board's studies for validating its use of the tests were found to satisfy appropriate methodological and documentation requirements;[7]

(7) The validation studies demonstrated positive, statistically significant correlations between scores achieved on the tests and the level of success achieved by employees in subsequent training programs, which the court found were intended to and did "provide skills or knowledge needed for performance of the job";[8]

(8) The validation studies demonstrated a positive, statistically significant correlation between scores on the police officer

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[5] Since 1965, the Board "not only sought to provide nondiscriminatory opportunities for black applicants, but also attempted, within the limits of its statutory duties, to rectify the racial imbalances in local government employment." 13 EPD 6795, App. C, page A-30. "Since 1965 the Board, with the cooperation of local civic groups and some of the employing agencies, has been actively engaged in recruitment efforts to attract black applicants." *Id.* at 6795, App. C, page A-31.

[6] The Board conducted various studies as to the validity, fairness and usefulness of the tests it administered. In 1974, the Board "immediately" adjusted its testing program, when advised by its experts that the use of a modified scoring key for the policeman test would increase the validity of that test for black applicants. *Id.* at 6795, App. C, page A-31.

[7] *Id.* at 6798, App. C, page A-35.

[8] *Id.* at 6799, 6802, App. C, pages A-38—A-39, A-45. The court referred to the "significant relationship" of the test results to grades in the training academies, and noted that "this relationship cannot be doubted." *Id.* at 6802, App. C, page A-45.

test and an overall job performance criterion the court found to be valid;[9] and

(9) There was no showing that the test had any differential validity for minority applicants.[10]

Nevertheless, the district court held that performance in the respective academies, as shown by academy grades, could not be used as a criterion measure to correlate with performance on the entrance examinations; and that the tests did not show "operational utility" and could not be used to rank blacks and whites as a group in light of the small correlations and great adverse impact on blacks.[11]

The court of appeals affirmed, holding where tests were used to select candidates with more than a minimum amount of knowledge necessary to complete job-related training, absent a further showing of a significant correlation between the degree of performance in the academy and on the job, the use of the test would violate Title VII.

REASONS FOR GRANTING THE WRIT

This case raises questions of great importance about the permissive scope of the use of testing under Title VII. Both the district court and the court of appeals ignored the standard set forth by this Court in *Washington* v. *Davis* that an entrance exam will be deemed to be job-related if it predicts success in a

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[9] 13 EPD 6799, 6802-03, App. C, pages A-40, A-45—A-48.

[10] The court's detailed analysis of fairness demonstrated that the performance of blacks was, if anything, over-predicted by the policeman test. The court concluded that this test's use was "not to be criticized on the basis of differential validity inquiries." *Id.* at 6802, App. C, page A-44. The court found that it was not feasible to conduct such inquiries with respect to the firefighter test. *Id.*

[11] *Id.* at 6806-07, App. C, page A-54.

job-relevant training program. Further, the court of appeals held that absent an additional validation study showing a correlation between successful completion of the training academy curriculum and performance on the job, an employer may not use a test to select persons other than those minimally qualified to complete academy training. Finally, the lower courts ruled that a test with a low validity coefficient, but which had a high degree of adverse impact, could not be used even though it was shown to be job-related. The Board submits that these rulings are incorrect. Moreover, if permitted to stand, the decisions of the lower courts can be expected to chill the use of objective tests to select the best qualified persons for jobs not only in the Fifth Circuit but throughout the country.

1. The Lower Courts, in Holding that Success in the Training Academy, as Measured by Relative Standing, Was Not a Valid Criterion Measure, Ignored the Case of *Washington* v. *Davis*, 426 U.S. 229 (1976).

Most of the testing cases before this Court have involved "quick and dirty" validation efforts which attempted to justify poor or ill-conceived tests or made no effort to show the tests were job-related. See *Albemarle Paper Company* v. *Moody*, 422 U.S. 405 (1975); *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971). This is not one of those cases. In 1965, almost seven years before Title VII was made applicable to state and local governmental agencies, the Personnel Board began its efforts to find a job-related selection device for police officers and firefighters. After examining numerous professionally prepared tests, the Board selected the professionally developed IPMA 10-C test to use as their entrance exam for police officer and the professionally developed IPMA 20-B test for use as the entrance exam for firefighter. Validation efforts began in early 1966. In 1970, four years before the first suit was filed and two years before Title VII became applicable to the Personnel Board, initial studies indicated that the police officer and firefighter tests

used by the Board had validity. Outside consultants were hired three years before the Department of Justice brought suit.

Both the 10-C and 20-B selection devices predict success in the training academy (as measured by overall average grade in the academy) beyond *.01* level of confidence.[12] Uncontradicted testimony showed that the fire and police academies taught knowledges and skills that were essential to adequate performance of a police officer or firefighter and that the skills could not be learned on the job. The academy directors and the outside consultants testified that recruits who excelled in the academies, as a group, made better police officers and firefighters. The district court noted that even though the tests were correlated with overall academy grades, because there were no job incentives (benefits, etc.) to perform well in the academies, the use of those academy grades as criterion measures for correlation with test scores was inappropriate.[13]

Furthermore, the academy grades were based in part on paper and pencil tests, a "fault" that the district court used to support its conclusion that academy grades could not be used as a criterion measure.[14] The court then stated:

> [I]t is the court's conclusion that *relative* standing in the academies, as distinguished from successful completion of academy training, is not an appropriate criterion unless it also be demonstrated that those academy grades are themselves valid predictors of job performance.[15]

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[12] A level of confidence of .05 is sufficient to show significance under all testing guidelines. Significance at $p < .01$ exceeds these minimum requirements.

[13] 13 EPD 6799, App. C, page A-38.

[14] *Id.*

[15] *Id.* at 6802, App. C, page A-44.

The court of appeals affirmed, stating that the district court's findings were not clearly erroneous.[16]

The lower court decisions that the correlations between performance on the entrance exams and performance in the academies were suspect because of the use of academy grades[17] disregard this Court's decision in *Washington* v. *Davis,* 426 U.S. 229 (1976).

Washington v. *Davis* involved a challenge of the hiring practices of the Metropolitan Police Department of Washington, D.C. Pursuant to a motion for summary judgment, the district court held that performance on the entrance exam was "reasonably and directly related to the" academy training performance and use of the test was permissible despite the large failure rate of blacks as a group. *Davis* v. *Washington,* 348 F.Supp. 15, 17 (D.D.C. 1972). The Court of Appeals for the District of Columbia reversed the trial court. The D.C. Circuit held that the use of academy scores as the sole criterion measurement was impermissible for validation of a test which had a disproportionate impact on blacks. *Davis* v. *Washington,* 512 F.2d 956 (D.C. Cir. 1975). This Court reversed the court of appeals and held that use of the test did not violate the Constitution or any statute, including Title VII.[18] *Washington* v. *Davis,* 426 U.S. 229 (1976).

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[16] 616 F.2d at 818, App. B, page A-13. The Board submits that the clearly erroneous doctrine applies to findings of facts and not conclusions of law.

[17] Academy grades, as used by the independent consultants for their validation studies, consisted of a combination of written and performance test scores.

[18] While *Washington* v. *Davis* was not a Title VII case, the testing standards applied in *Washington* v. *Davis* were "similar to those . . . under Title VII." 426 U.S. at 249. There has been some question about the applicability of *Washington* v. *Davis* to Title VII cases. See, e.g., *Blake* v. *Los Angeles,* 595 F.2d 1367, 1378 (9th Cir. 1979). The Board respectfully suggests that the application of *Davis* standards to Title VII testing cases may be an additional issue the Court may want to address if it grants the Board's petition for a writ of certiorari.

The facts of *Washington* v. *Davis,* are amazingly similar to the facts of this case. The entrance test used to select Washington police officers was Test 21, which was used to test verbal ability.[19] *Davis* v. *Washington,* 512 F.2d at 958, 348 F.Supp. at 16. A passing point of at least 40 correct answers out of 80 was set for Test 21.[20] *Id.* at 966. Approximately fifty-seven percent of the blacks taking Test 21 failed, while only thirteen percent of the whites failed.[21] *Id.* at 958.

The similarities between *Washington* and the Jefferson County Personnel Board do not end with the entrance exam. Like the case at bar, the Washington police academy never had anyone fail the academy, and since a minimum score of 70 was required to pass the academy, the range of grades was restricted, with almost three-quarters of all recruits having grades between 85 and 95. *Davis* v. *Washington,* 512 F.2d at 962, n. 38; 348 F.Supp. at 16. A validation study indicated that performance on the entrance exam used to select Washington police officers correlated significantly with *written* examinations given in the training academy.[22] The *Davis* court of appeals, looking at the validation study, stated:

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[19] The 10-C and 20-B exams were designed specifically for police officers and firefighters, and measured verbal ability. 616 F.2d at 816 n.9, App. B, page A-8.

[20] The lowest passing point on the 10-C was 31 correct answers out of 80.

[21] Fifty-two percent of the blacks failed the 10-C examination, while ten percent of the whites failed. 13 EPD 6796 App. C, page A-33.

[22] The *Davis* validation study never made any attempt to correlate performance on the entrance exam with successful *completion* of the academy.

> We think this evidence tends to prove nothing more than that a written aptitude test will accurately predict performance on a second round of written examinations . . . 512 F.2d at 962.

The court of appeals continued:

> All entrants into Recruit School pass the final examinations with a grade of 70 or above; if a particular candidate has difficulty, he is given assistance until he succeeds in passing the examinations. The validity study revealed that persons with high Test 21 scores are more likely to achieve a final average exceeding 85 in Recruit School, but there is no evidence to support the proposition that a candidate with an average below 85 is more difficult to train or will not be as good a police officer as a candidate with an average over 85. Moreover, since applicants who scored below 40 on Test 21 have never been admitted to Recruit School, the validity study expressed no conclusion regarding the likely performance in Recruit School of Test 21 failures. For these reasons, and because of the departmental policy that nobody fail Recruit School, appellees have not shown that that admission of applicants who score below 40 on Test 21 into the Recruit School would necessitate expanded training time or produce Recruit School failures. We might add that the Recruit School averages apparently have not been used by the Department for any purpose other than the attempt to validate Test 21 in this case. 512 F.2d at 963. (footnotes omitted)

For those reasons the D.C. Circuit held that use of academy grades as a criterion measure was improper, and remanded the case to the district court to determine whether the use of Test 21 was warranted. This Court reversed the court of appeals and agreed with the district court that a positive relationship between performance on an entrance examination and in a training academy was sufficient to validate an entrance examination. *Washington* v. *Davis,* 426 U.S. 229, 248-53 (1976).

The lower courts, in the case at bar, committed the same errors. They ignored the uncontraverted testimony of seven witnesses, who were experts in their fields and who were personally acquainted with the practices of the police and fire academies, that the academies taught skills and knowledges that were not just job-relevant, but were essential to adequate performance of a police officer or firefighter. Testimony that the skills and knowledges taught in the academy could not be learned on the job was also ignored. Instead, the lower courts reasoned because correlations between the entrance examinations and academy scores were based, in part, on performance on *written* examinations,[23] and because there were no incentives for superior performance in the academies,[24] the use of academy grades for a criterion-measure was impermissible. The lower courts in this case and the court of appeals in *Washington* v. *Davis* used identical reasoning to find that academy performance could not be used as a criterion measure. As this Court said, such reasoning is error and is due to be reversed.

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[23] The trial court overlooked the fact that written examinations test the knowledge of theories which are essential to satisfactory performance as a firefighter or police officer. For example, a firefighter must know not only that a fire is burning, but he must know what type of fire it is and what chemicals must be used to extinguish it.

An additional benefit of a written objective test is that it is less subject to personal bias and prejudices. Such bias and prejudice might accompany other testing procedures. There is less of a chance for discrimination against minorities with the use of objective written test than there would be with the use of subjective selection devices.

[24] While there were no "rewards" or "punishments" based on performance in the academy, this does not eliminate the employer's need and desire to have all trainees perform well in the academy. Furthermore, the academy directors testified that those that performed well in the academies, as a group, made better police officers and firefighters.

This Court should take the opportunity to resolve, once and for all, the issue of whether a test which predicts success in job-relevant training meets the job-related standards of Title VII. We respectfully submit that the district court's imposition of additional requirements beyond the showing that the test predicts success in the academy is unwarranted and certainly not contemplated by the framers of Title VII. The imposition of these additional standards discourages employers from developing their own training programs. This may result in the employer turning to additional certification or educational requirements which conceivably would have more impact upon protected groups than the use of written tests.

2. This Court Should Permit the Use of a Test, Which Is Shown to Be Job-Related, to Select Those Persons Who Are Best Qualified for the Job.

The Fifth Circuit read *Davis* to require an additional step in the validation process. This additional step was that the Board's tests, after a showing of correlations between performance on the tests and performance in job-relevant training, could be used only to predict the *minimum* skills to *complete* the training program.[23] The court went on to state:

> *Washington* v. *Davis* holds that a selection device may be validated if it is shown to predict whether an applicant has a *minimum* amount of reading and verbal skills necessary to *complete* a job-relevant training program. 616 F.2d 821, App. B, page A-20 (Emphasis added).

The Board submits that the Fifth Circuit not only misconstrued the facts of *Davis,* but also established a new standard of testing which could have severe impact on the legitimate goal of employing the best qualified person for the job.

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[23] Id. at 818, App. B, page A-20.

The facts of *Davis* do not show that the *Davis* test was selecting those police officer candidates who had the *minimum* skills to complete job-relevant training. The record shows that the validation study used by the Metropolitan Police Department indicated that the number of correct answers necessary to pass Test 21 could be lowered from 40 to 35 without producing academy failures.[26] Yet the passing point was never lowered. Thus, the test approved in *Davis* did not select those who had minimum skills. Likewise, the record shows there was no prediction that those who failed Test 21 could not complete the academy training. As the court of appeals in *Davis* stated:

> The validity study revealed that persons with high Test 21 scores are more likely to achieve a final average exceeding 85 in the Recruit School, but there is no evidence to support the proposition that a candidate with an average below 85 is more difficult to train or will not be as good a police officer as the candidate over 85. Moreover, since applicants who scored below 40 on Test 21 have never been admitted to Recruit School, the validity study expressed no conclusion regarding the likely performance in Recruit School of Test 21 failures. For these reasons, and because of the departmental policy that nobody fail Recruit School, appellees have not shown that the admission of applicants who score below 40 on Test 21 into the Recruit School would necessitate expanded training time or produce Recruit School failures. 512 F.2d at 963. (footnotes omitted)

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[26] D. FUTRANSKY, RELATION OF D.C. POLICE ENTRANCE TESTS SCORES TO RECRUIT SCHOOL PERFORMANCE AND JOB PERFORMANCES OF WHITE AND NEGRO POLICEMEN 2 (Report published by United States Civil Service Commission) (1967), (hereinafter Futransky Study). The Futransky Study was reprinted in the Appendix in *Washington* v. *Davis,* at page 99, *et seq.* and in the Justice Department Supplemental Appendix in the appeal to the Fifth Circuit of the case at bar, at page 2, *et seq.*

The Fifth Circuit's interpretation that *Davis* only permits the use of tests which predict success in training to select those candidates with the *minimum* qualifications to *complete* training is unsupported by the facts in *Davis*.

The Fifth Circuit's opinion does much more than misconstrue the facts of *Davis*. It establishes a new requirement in the testing area that goes beyond the job-related standards of Title VII. As we read the Fifth Circuit's opinion, it permits the selection of only those people with the *minimum* qualifications for the job. It prohibits the selection of employees, who, through performance on a job-related test, have demonstrated that they will learn the necessary skills and knowledge of the job more readily. This Court has made it clear that an employer may select the *best qualified* employee without violating Title VII. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31 (1971). See, also, 110 CONG. REC. 7213 (1964).

Title VII permits an employer to select those employees who are best qualified for the job. Title VII does not require an employer to hire anyone who is marginally competent but instead encourages employers to select those people who are best qualified for the job without considering their race, color, sex, creed or national origin. The Fifth Circuit rejected this theory of selecting the best qualified person for the job and would require employers to use tests only as screening devices to eliminate those people who are clearly and demonstratively unfit to learn the duties of a given job.

3. Comparing the Magnitude of Significance with Degree of Impact Should Have No Bearing on Use of the Test.

The Department of Justice Guidelines[27] provides:

> Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects[28] and has a low correlation coefficient will be subject to close review if it has a large adverse impact. § 12(b)(5).

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[27] *Department of Justice Guidelines on Employee Selection Procedures,* 28 C.F.R. § 50.14 (1976). The D.O.J. Guidelines are attached as Appendix G. The D.O.J. Guidelines were promulgated just before trial and cited by the district court in its opinion. During the validation work by the Board and its outside consultants, the *E.E.O.C. Guidelines on Employee Selection Procedures,* 29 C.F.R. Part 1607, were the only testing guidelines published by a government agency. The E.E.O.C. Guidelines are attached as Appendix H. After the district court rendered its opinion the E.E.O.C. and the Justice Department together with other enforcement agencies promulgated the *Uniform Guidelines on Employee Selection Procedures,* attached as Appendix F.

The E.E.O.C. Guidelines differ markedly from the D.O.J. and Uniform Guidelines. The Uniform Guidelines represent an evolutionary step in the D.O.J. Guidelines.

The same theory of comparing the magnitude of impact with the "amount" of validity was carried from the D.O.J. Guidelines to the Uniform Guidelines. *Compare,* § 12(b)(5) App. G, with § 14 B(6) App. H.

[28] The Board's studies were based on samples of less than 200 people. According to generally accepted psychological testing authorities, this is only a moderate size sample. Two hundred subjects is not a large number for criterion-related validation studies. SCHMIDT, HUNTER AND URRY, STATISTICAL POWER IN CRITERION-RELATED VALIDATION STUDIES 6-9, and 12-13 (United States Civil Service Commission, Professional Series 75-7) (1975).

The district court seemed to be reaching for the same proposition in its practical utility analysis. The court conceded that the 10-C police officer exam predicted success on the job. Once job-relevance was demonstrated, the court should have ended its analysis. The district court however then engaged in a lengthy analysis of the "practical utility" of the exam. Apparently this practical utility analysis was an attempt to balance the impact of the exam against its validity. This was certainly the position advanced by Dr. Ramsey, the plaintiff's expert, when he conceded that the police officer exam predicted success in the academy *and on the job,* but *because of the impact of the exam on blacks,* he could not support its use. The Board submits that the attempts by the Guidelines, the district court and the plaintiff's expert to balance validity with impact are inappropriate and unsound testing theories and are akin to mixing apples and oranges.

Although the testing guidelines are entitled to "great deference", the guidelines are "not administrative regulations promulgated pursuant to formal procedures established by the Congress." *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 431 (1975). Congress has withheld from the EEOC, for example, the authority to promulgate substantive rules in this area. 42 U.S.C. 2000(e)-12(a).[29] The guidelines have no legislative force, and are at most, interpretive rules. Interpretive rules are, of course, not binding upon the courts. *Espinoza* v. *Farah Mfg. Co.,* 414 U.S. 86 (1973).

This is particularly true of the Department of Justice Guidelines. The Justice Department is not a regulatory agency

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[29]Such power would have been granted under § 714(a) of the proposed bill as reported by the House Judiciary Committee, see H. R. No. 914, 88th Cong., 2nd Sess. 14, 31 (1964), but was limited to *procedural* rule making by a floor amendment sponsored by Representative Celler. 110 CONG. REC. 2575 (Feb. 8, 1964).

engaged in the quasi-legislative and quasi-judicial administration of complex regulation pursuant to delegated authority. It is not charged with the execution of a statute; it is the courts that are so charged. The Justice Department is an advocate with both the power and the duty to come into the courts to achieve its goals like any other advocate and as such its interpretations are particularly open to rebuttal. The deference owed to even an "expert tribunal" —much less that owed to an advocacy agency — "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions made by Congress." *American Ship Building Co.* v. *NLRB,* 380 U.S. 300, 318 (1965).

Title VII allows the hiring of the most qualified applicant without regard to race, color, creed, sex, or national origin. 42 U.S.C. 2000e-2(a), (j). Congress has not commanded that less qualified individuals be preferred over those with better qualifications simply because they are of a minority group. *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). If entrance examination, results have significant correlations with job (as the 10-C exam does here), that performance exam is selecting people who, as a group, are better qualified to perform the job. To add an additional requirement that the test significance be compared with impact on the job does not increase or decrease the validity of the test. The test remains valid regardless of the amount of impact.

What these balancing requirements do, however, is work against an employer's affirmative action programs. As an example, County X has a work force that is twenty percent black and over the past few years twenty percent of the applicants on a law enforcement entrance examination have been black. Fifty percent of the blacks and fifty percent of the whites taking the examination fail, twenty percent of the blacks are hired as police officers, and the test has been validated with performance on the job with a correlation coefficient of .20.

County Y has exactly the same racial composition, uses the same test, has obtained the same correlation coefficient in its validity study and had the same pass-fail rate for blacks and whites until two years ago. At that time, County Y instituted an affirmative action program whereby black applications increased to make up fifty percent of the applicant total. At the same time because of the decrease in the overall qualifications of the black group caused by the increased number of unqualified applicants who responded to the affirmative action program, the black failure rate jumped to seventy percent. County Y would have a very large impact and a very slight validity. Under the lower courts' rationale, County Y would have violated Title VII. Yet in County X the lack of adverse impact would not affect the small but significant correlation coefficient, even though the same test was used, and County X would not be in violation of Title VII. The sole cause of the difference is County Y's adoption of an affirmative action program.

The use of this example is intended to illustrate that the comparison of significance in a validation study with impact can cause great problems for those employers who institute affirmative action programs. The net result is to discourage affirmative action plans if one has a validated test. Both the Department of Justice and Uniform Guidelines, in an attempt to develop uniform testing procedures, have made the adoption of affirmative action programs a course of action fraught with risk.

If the comparison between levels of validation and amount of impact are deemed to be legitimate requirements of Title VII, additional problems could result. For example, a test which may be deemed valid one time it is given may not be deemed valid the next time it is given if judged on its impact. As stated earlier, impact can vary due to a number of outside forces including affirmative action plans. Furthermore, use of nationwide tests may be valid for some states or regions but may be invalid for others

if educational differences, for example, cause adverse impact within a particular race or group. A test's validity should be judged on its ability to select qualified applicants and not on the shifting variables of what percentage of various racial or ethnic groups take and pass the test.

In light of the significant efforts by the Personnel Board to institute affirmative action recruitment programs and in light of the lack of discriminatory intent, the Personnel Board submits that it is unfair and wholly inappropriate to balance impact of a test against statistically significant correlations between the entrance exam and performance on the job.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for Certiorari have this date been duly served by mail upon all parties represented in this proceeding.

This the 12th day of September, 1980.

DAVID P. WHITESIDE, JR.